

Coles



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Diversified Contract Services, Inc.

File: B-237209

Date: January 22, 1990

DIGEST

Protest challenging rejection of protester as nonresponsible is denied where protester fails to show that nonresponsibility determination by contracting agency and subsequent denial of certificate of competency by Small Business Administration (SBA) were the result of bad faith--notwithstanding protester's disagreement with contract agency's and SBA's conclusions--because record contains no evidence that government officials acted with specific and malicious intent to harm protester.

DECISION

Diversified Contract Services, Inc., protests the rejection of its bid and the subsequent award of a contract to J.L. Associates under request for proposals (RFP) No. DLA137-89-R-0001, issued by the Defense Logistics Agency (DLA) for cold storage warehouse services. Diversified, a small business, challenges DLA's determination that it was nonresponsible and the Small Business Administration's (SBA) subsequent refusal to issue the firm a certificate of competency (COC). Diversified contends that the agencies' evaluations of the firm's financial condition were conducted in bad faith since both were predicated on the agencies' prejudice against Diversified because it had filed a Chapter 11 bankruptcy petition.

We deny the protest.

The RFP called for award of a contract for a base year and four 6-month options for services related to the operation of a government-owned refrigerated cold storage warehouse for the San Francisco Bay area. DLA received five offers by the April 10, 1989, closing date; Diversified, the incumbent, was in line for award as the low offeror. After receiving both a notice that Diversified had filed a Chapter 11 bankruptcy petition, and a request from the Internal Revenue Service (IRS) for offset of the proceeds

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under Diversified's current contract for tax liability in excess of \$1,600,000, the contracting officer asked the Defense Contract Administration Services Management Area (DCASMA), San Bruno, California, to conduct a pre-award survey on Diversified. The pre-award survey team determined that Diversified lacked financial capability and, consequently, recommended that no award be made to Diversified.

After considering DCASMA's recommendation of no award and other negative information regarding Diversified's financial condition, the contracting officer determined that Diversified was nonresponsible. Specifically, the contracting officer based her nonresponsibility determination on the following factors: a \$1,424,713 tax lien filed by the IRS; information from the Department of Labor that required pension fund payments on behalf of Diversified's employees had not been made and that problems had occurred regarding Diversified's contribution to the unemployment insurance fund; and information from two of Diversified's employees stating that their paychecks had been dishonored as a result of Diversified's lack of sufficient funds in its payroll account.

On September 8, the contracting officer referred her nonresponsibility determination to SBA under the COC procedures. SBA refused to issue a COC after concluding that Diversified was not financially responsible. Specifically, SBA declined to issue the COC because of Diversified's lack of a court-approved reorganization plan; Diversified's failure to demonstrate that it had the working capital or access to working capital to service prior debt as well as the proposed contract in a satisfactory manner; and Diversified's unsatisfactory credit.

Diversified contends that DLA evaluated the firm's financial condition in bad faith because prior to its evaluation, it had already prejudged Diversified's financial capability based on Diversified's bankrupt status. Moreover, Diversified claims that DLA improperly used an arbitrary line of credit condition--requiring that Diversified have a line of credit equal to 2 months' operating expenses, or \$300,000--in the current procurement which it had not used in prior procurements. With respect to SBA, Diversified contends that SBA evaluated its firm's financial condition in bad faith because it had already prejudged Diversified's financial condition based on its bankrupt status and, consequently, failed to acknowledge that Diversified's financial situation would improve and enable it to perform the contract.

Government officials are presumed to act in good faith and, therefore, in order to establish bad faith, a protester must present convincing proof that they had a specific and malicious intent to injure the protester. Sard Enters., Inc., B-233661, Mar. 16, 1989, 89-1 CPD ¶ 280. Here, there is no probative evidence that DLA or SBA was motivated by bad faith or prejudiced against Diversified because of its bankrupt status. Rather, the record shows that the determinations that Diversified was not a responsible firm were based on the agencies' reasonable concerns regarding Diversified's financial capability.

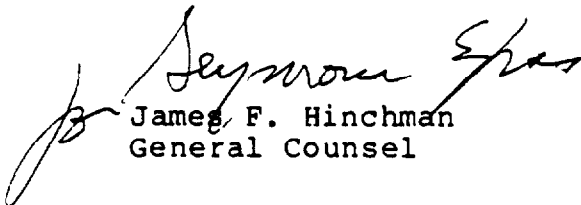
With regard to DLA's determination, the \$300,000 line of credit requirement which Diversified challenges was based on the current contract price (\$1,700,000) divided by 12 months and multiplied by two. DLA reasonably used this formula to insure that the contractor had funds to operate for 30 days, and to invoice and receive payment 30 days after invoice. Considering that Diversified's current price was 15 percent lower than its price under the prior contract which caused Diversified severe financial reverses, the contracting agency concluded that the firm's ability to perform successfully without a line of credit was highly questionable. Moreover, Diversified had negative working capital, negative net worth and had in fact missed payrolls due to insufficient funds in its payroll account to compensate its employees. Under these circumstances, we see no basis to conclude that the contracting officer's concern as to Diversified's financial capability resulted from any intent to injure the firm; rather, we find that in light of Diversified's financial problems, the contracting officer reasonably required the line of credit as security to protect the government's interest.

With regard to SBA's decision not to issue a COC, Diversified states that SBA ignored information showing that some of its unprofitable contracts would expire on September 30, thereby eliminating the losses associated with them and improving Diversified's financial condition. SBA responds that while it did consider this information, as well as other available information, Diversified failed to meet its burden of showing SBA that it was financially capable of performing the contract. We agree. Although Diversified contends that its net profits declined due to specific contracts which it had underbid, SBA reasonably found that the information Diversified submitted to SBA indicated that losses on such contracts accounted for only some of Diversified's losses. As a result, SBA reasonably concluded that Diversified did not substantiate its claim that its cash flow would improve when its losing contracts expired on September 30.

Diversified also claims that SBA based its nonresponsibility determination solely on the fact that Diversified lacked a court-approved reorganization plan. Based on our review of the record, SBA based its nonresponsibility determination not only on Diversified's lack of a court-approved plan, but on Diversified's significant negative net worth, its unsatisfactory credit, and its unresolved liability with IRS as well. Although Diversified disagrees with SBA, it has failed to present evidence showing that SBA had specific and malicious intent to harm it; in fact, contrary to Diversified's contention that SBA was biased against it, the record shows that SBA allowed Diversified 11 working days (or more than double the required 5-day period) to submit information to demonstrate its responsibility.

In our view, it is clear that DLA's and SBA's determinations were based on legitimate concerns regarding Diversified's capacity to perform, not on any prejudgments of the firm due to its bankrupt status. Since the record shows that the agencies' concerns were reasonable, we see no basis to question their nonresponsibility determination. See Sam Gonzales, Inc.--Recon., B-225542.2, Mar. 18, 1987, 87-1 CPD ¶ 306.

The protest is denied.


James F. Hinchman
General Counsel